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No. 668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMPLEX OF MARYLAND, INC., *Petitioner,*

v.

OUTBOARD MARINE CORPORATION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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This case turns entirely upon issues of fact. The plaintiff, petitioner here, was a marine dealer who alleged that an outboard motor manufacturer, respondent here, refused to sell its outboard motors to the dealer and that, in so refusing, respondent violated Sections 1 and 2 of the Sherman Act. Petitioner-plaintiff waived a jury and the case was tried to District Judge (now Circuit Judge) Harrison Winter sitting without

a jury. At the close of plaintiff's case the District Court made findings of fact which, under familiar and undisputed principles of law, refuted liability on the part of the manufacturer. Petitioner appealed, asserting that the District Court had found the facts incorrectly, but the Court of Appeals for the Fourth Circuit concurred in the lower court's findings and affirmed. Given these concurrent findings by the two courts below, it would seem *prima facie* that this is not a case which should be reviewed on the facts by this Court. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271 (1949); *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275 (1944).

In its efforts to keep the case alive petitioner has gone to quite extraordinary lengths in this Court. In fact it is difficult to recognize the case from the petition. By distortions built upon fragments of fact without record citation, by frank reliance on matters outside the record, and by the assertion of claims which were not mentioned in the courts below, petitioner has presented an ingenious but entirely misleading picture of an otherwise unnoteworthy case.

Moreover, the erroneous factual picture set forth in the petition has apparently led the Department of Justice to believe that the case involves a new and important question of antitrust law, with the result that the United States has filed a memorandum in support of the petition. With all due respect, respondent submits that the Government's memorandum is not based upon a responsible reading of the record and that the antitrust issue for which the Government seeks review is not in fact involved in the case at all. The actual nature of the case is as follows.

QUESTIONS PRESENTED

The only questions properly before this Court are as follows:

(1) Where an antitrust plaintiff's evidence shows, and the courts below concurrently find, that the defendant-manufacturer is not engaged in a program to require its dealers generally to deal exclusively in its products, but rather has a policy of not discriminating against those who handle competing products, is a violation of Section 1 or Section 2 of the Sherman Act established merely by proof that the manufacturer unilaterally refused to deal with a single dealer who was handling competing products?

(2) Where an antitrust plaintiff, after introducing its principal evidence, is offered and voluntarily accepts an opportunity to make a proffer as to all of its remaining evidence, and where the District Court, sitting without a jury, then accepts as true all facts directly proved or proffered by the plaintiff, must that District Court then draw all inferences from those facts in favor of the plaintiff in determining whether the plaintiff has a cause of action, or may the Court draw inferences from those facts as at the close of the plaintiff's case?

COUNTERSTATEMENT

1. The Procedure Followed at the Trial

At the beginning of the trial petitioner made an opening statement to the Court (Tr. 7-23). At the close of the statement the Court was in serious doubt as to whether the facts alleged in the opening statement, if proved, would constitute a cause of action

under the Sherman Act.[1] Nevertheless, petitioner was allowed to proceed with its case, and in the next four and one-half trial days petitioner presented the testimony of five witnesses, introduced voluminous documentary exhibits into evidence, and thus compiled a trial transcript of about 760 pages. Petitioner's principal witnesses were as follows:

(1) Nicholas Canzona was the president and principal stockholder of petitioner (R.A. 1, 4).[2] Generally, he testified that petitioner operated a marine dealership in Arnold, Maryland, that in the spring of 1960 petitioner had been awarded a franchise to sell the so-called "Johnson" outboard motor manufactured by respondent's Johnson Division, that that franchise had been renewed for the year 1961, that respondent had refused to renew it for the year 1962, and that the reason for the refusal to renew was the fact that in 1961 the petitioner had begun to sell the so-called "Mercury" outboard motor (R.A. 17; Pl. Ex. 33, R.A. 196-99; P.A. 44-45).

(2) Paul Wright was a former employee of respondent. In 1960 he was employed as a salesman for respondent's Johnson Division, covering a territory ("Territory 23") which included petitioner's place of business (P.A. 57, 58-59). It was Mr. Wright who recommended that petitioner be given a Johnson dealership in April 1960 and who recommended the re-

[1] The doubt, while not expressed until later in the trial, existed from the outset (Tr. 516).

[2] "P.A." and "P.S.A." refer, respectively, to petitioner's Appendix and Supplemental Appendix containing that portion of the record that was printed for the Court of Appeals. "R.A." refers to respondent's printed Appendix.

newal of the franchise for 1961 (P.A. 58-59; Pl. Ex. 33, R.A. 197). Mr. Wright left the respondent's employ in February 1961 (P.A. 57).

(3) Mr. Elio Schiavina was Mr. Wright's immediate successor as the Jackson salesman for Territory 23 (R.A. 65). It was Mr. Schiavina who recommended to his supervisors that the petitioner's franchise not be renewed at its expiration at the end of September 1961 (R.A. 76-77; Tr. 701).

The foregoing witnesses were the principal actors in the events which gave rise to the case, but at the conclusion of their testimony there apparently was a question in Judge Winter's mind as to whether petitioner had even begun to establish an antitrust violation (see R.A. 81-83). Petitioner had made known that it intended to call approximately forty additional witnesses, but the District Court had some doubt that the additional testimony would add what was necessary for petitioner to make out a case (Tr. 745-46; R.A. 81). There was the possibility, therefore, of several weeks of trial resulting only in a waste of effort on the part of the Court and the parties.

Under these circumstances Judge Winter made a "suggestion" as to which he invited "any comments now that you [petitioner] want to make" (R.A. 84). The suggestion was that the trial be recessed to give the parties an opportunity to brief the law applicable to the case and to give petitioner an opportunity to prepare and to make a proffer of all additional evidence that it proposed to offer (R.A. 84). Contrary to petitioner's statement in this Court that "the district court intimated that it was about to dismiss the case"

(Pet. 2-3), the District Court when making its suggestion said,

> "I do not know whether you have a possible case or whether you do not, but I do have the basic feeling, which I have expressed to you before, and that is that if I conclude that you do not have a possible case, in your interests, in my interests and in the interests of the defendant, it is better to face it now." (R.A. 84)

To this petitioner's counsel immediately and directly responded,

> "I think Your Honor is very much correct, and I concur with everything said as to the preparation of the brief and a proffer as to the testimony that I would hope to offer and at that time, if it is Your Honor's opinion that based upon the brief and proffered testimony that there is no case, that the proceedings would be closed at that time and if plaintiff desired an appeal, he would take it at that time." (R.A. 84)

The suggestions in the petition (pp. 3, 23) and in the Government's Memorandum (p. 2) that the Court "required" and "directed" the petitioner to truncate its case against its will are hardly accurate.

After approximately a week's recess in the trial, briefs were submitted, oral argument was held, and petitioner made a detailed proffer of the additional evidence, both testimonial and documentary, which it proposed to introduce, and in the course thereof gave a full description of its proposed additional proof (presumably described in its best possible light from petitioner's standpoint) (P.A. 98-117).

Thereupon the District Court found and concluded that petitioner's total proof, both that already in evi-

dence and that proffered, was insufficient to prove any violation of law by respondent, on any theory of the law or facts advanced by petitioner (Pet. B-1-12; P.A. 11-15, 17-22). Because nothing would have been gained by proceeding further, the Court entered judgment for respondent.

2. Petitioner's Evidence

The facts established during petitioner's case were in material part as follows:

1. Respondent Outboard Marine Corporation (OMC) manufactured, among other things, three different brands of outboard motors—Johnson, Evinrude and Gale—each of which was manufactured and distributed by a separate Division. Each Division sold its outboard motors to independent dealers, who resold at retail (Pl. Ex. 68, R.A. 204-05).

2. Respondent was one of 12 outboard motor manufacturers in the United States. For the purpose of this case both courts below assumed that respondent's three motors (Johnson, Evinrude, and Gale), taken together, constituted slightly less than 60% of the outboard motors sold in the United States in the relevant period (P.A. 99; Pet. B-6, A-4, A-6). Among the other eleven manufacturers were the Kiekhaefer Division of Brunswick Corporation, which manufactures the "Mercury" motor, and McCulloch Corporation, which manufactures the "Scott" motor (P.A. 28).

3. Petitioner offered to prove that the 12 outboard motor manufacturers distribute their motors through some 12,000 to 15,000 outboard motor dealers (P.A. 99). Respondent's three brands are distributed through a total of 8,700 dealers (Pl. Ex. 68, R.A.

205). There is no evidence as to how many of those 8,700 dealers handle the Johnson motor (as distinguished from the Evinrude and Gale motors).

4. There is evidence that the majority of the 12,000-15,000 motor dealers in the United States handle only a single line of engines (Def. Ex. 9, P.A. 42). Petitioner did not prove or offer to prove that the majority of respondent's 8,700 dealers handle only one line of engines, but it is undoubtedly the fact that most of respondent's dealers do concentrate on one or another of respondent's lines.

5. On the critical question as to *why* the majority of all marine dealers handle only one brand of motor, the only evidence in the record is to the effect that most dealers personally *prefer* to concentrate on one line (Def. Ex. 9, P.A. 142), perhaps for the same reasons that prompt most automobile dealers to concentrate on one line[3] (*e.g.*, in order to minimize the costs involved in carrying substantial inventories, training expenses for service personnel, etc.).

6. Petitioner's own witnesses, Messrs. Wright and Schiavina, testified that at all relevant times respondent had in force an affirmative policy of *not* declining to do business with a dealer because he was handling competitive products. That policy was embodied in printed instructions that were issued, and annually reissued, to Johnson's sales personnel (Def. Ex. 9, P.A.

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[3] Although there is no evidence in the record that most automobile dealers concentrate on one line, petitioner asserts in this Court (Pet. 10) that the "30,000 franchised automobile dealers . . . deal exclusively or primarily [in] the products of a single supplier", and respondent is prepared to accept the assertion for the purposes of argument on the instant petition for certiorari.

142; P.A. 88-89; R.A. 61-62, 64).[4] The same witnesses also testified that Johnson's management had in fact no objection to petitioner's or any other dealer's handling competing motors (R.A. 57, 64). As Mr. Wright testified, the Johnson salesmen customarily informed the Johnson management when dealers were handling competitive motors, and the management would award a dealership to such a dealer if he also offered promise as a Johnson dealer (R.A. 57). In short, the petitioner affirmatively established on its own case, primarily through the testimony of an ex-employee of respondent, that respondent does *not* require its dealers to practice exclusive dealing. The suggestions made by the petitioner and the Government to the contrary are not supported by the record (indeed, they are asserted without record citation), and they are not true.

7. In April 1960, upon recommendation of Mr. Wright (R.A. 56), the Johnson Division awarded a Johnson dealership to petitioner (Pl. Ex. 11, R.A. 192-95), and respondent began selling Johnson motors to petitioner in May (R.A. 17). The dealership was en-

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[4] Typical of petitioner's use of matter which is not in the record is its reference to a 1956 Federal Trade Commission cease and desist order and hearsay evidence as to the supposed attitudes of certain of respondent's salesmen (Pet. 6-7). The District Court refused to receive in evidence either the cease and desist order or the hearsay testimony (Pretrial Order, P.A. 9; P.A. 80, 64-65). Neither of these evidentiary rulings was challenged by petitioner in the Court of Appeals below, and petitioner therefore has no right to rely upon the excluded matter in this Court. For the same reason the Government's reliance upon the same excluded evidence is also improper (Gov. Mem. 7-8 n. 13). If the Federal Trade Commission proceeding is to be considered at all, it should be borne in mind that the evidence in that case related to conduct which took place in late 1940's, long before the promulgation of the written policy referred to in the text.

tered under a written dealer agreement which contained no provision for renewal and which expired by its own express terms on September 30, 1960 (Pl. Ex. 11, R.A. 192-95).

8. Before it awarded the dealership to petitioner, the Johnson Division management knew that petitioner was successfully handling a competing motor, Scott, under a franchise agreement with the manufacturer (Pl. Ex. 6, R.A. 186-89; Def. Ex. 15, R.A. 96; P.A. 77). The Johnson dealership was nevertheless awarded, and petitioner sold both Johnson and Scott motors thereafter. As petitioner admits, Scott offered a full line of engines (Pet. 6).

9. Mr. Wright testified that soon after the award of petitioner's franchise he "suggested" to petitioner that it give up its Scott franchise and "phase out" the Scott motor (P.A. 41, 67). Mr. Wright (who had left respondent's employ five years before the trial and could in no sense be regarded as hostile to petitioner or friendly toward respondent) also stated unequivocally that his action violated company policy and was never reported by him to any superior (P.A. 69-72). Moreover, he made clear that at no time did the management of the Johnson Division "ever make any objection to [petitioner's] handling of competing lines of motors" (R.A. 57).[5]

10. Petitioner continued to handle Scott engines throughout its relationship with respondent. At the beginning of 1961 petitioner had on hand approximately 20 Scott engines, and in the spring of 1961, a year after

[5] Compare petitioner's erroneous assertion (made without record citation) that respondent "required" petitioner "to agree to 'phase out' " the Scott engine (Pet. 6).

the alleged "phase-out" suggestion by Mr. Wright, petitioner purchased "about 20" new Scott engines (R.A. 14, 15, 17; Tr. 602-03, 632), thus putting itself in a position to sell as many Scott engines in 1961 as it had sold in any preceding year (R.A. 15, 16). To support this project the petitioner advertised its Scott engines ahead of its Johnson engines (R.A. 23-24; Def. Ex. 19, R.A. 129). Petitioner continued to handle Scott engines until 1962, when Scott cancelled petitioner's franchise (R.A. 41).

11. When the first Johnson agreement expired in September 1960, Johnson awarded petitioner a new dealership agreement for the ensuing year (Pl. Ex. 33, R.A. 196-99), obviously knowing that petitioner was handling Scott, as well as Johnson, motors (R.A. 56-57; P.A. 59). Neither of petitioner's Johnson dealer agreements contained any provision restricting its right to deal in competing motors (Pl. Ex. 11, R.A. 192-95; Pl. Ex. 33, R.A. 196-99).

12. In or about March 1961 Mr. Schiavina replaced Mr. Wright as the Johnson sales representative for Territory 23, which included Arnold, Maryland, petitioner's place of business (P.A. 24; R.A. 95, 65). At that time petitioner was handling both the Johnson and the Scott motor, and Mr. Schiavina never made any objection to petitioner's handling of that competing brand.[6]

13. Following his arrival in the territory Mr. Schiavina submitted a series of written reports on petitioner's operations to the Johnson management in Wau-

[6] Despite lengthy testimony as to conversations between Schiavina and petitioner, the latter has never suggested that Schiavina had any objection to petitioner's handling of Scott.

kegan, Illinois. On March 8, 1961, he reported that petitioner's "Display" was "Poor"; that its "Attitude" was "Fair" and that its "Service Facilities" were "Poor" (Pl. Ex. 73, P.A. 137-38). The report also included these comments: "Place of business little on the squalid side and can stand improvements"; "It is a question in my mind how long he can stay solvent"; and "Not happy with this operation".

14. Another employee of respondent, Service Representative Lee Clayton, also visited petitioner's place of business in the spring of 1961 and reported in writing to the Johnson management on April 6 that, while petitioner's service arrangements might eventually be good, petitioner's "shop condition" is "a mess at present, being completely changed around" (Pl. Ex. 72, R.A. 207-08). For this reason, as among the possible "Service Station Listings" of "AA", "A" or "None", Mr. Clayton recommended no service station listing. Mr. Canzona himself testified that the projected improvements which prompted Mr. Clayton's earlier optimism for petitioner's service arrangements were never actually made (R.A. 2-3).

15. Mr. Schiavina visited petitioner's place of business again in May and reported in writing to the Johnson management on May 10, 1961, that, although petitioner had made some improvements in his place of business, Schiavina was still dissatisfied: "We discuss[ed] his squalid condition and he agreed that he has to clean it up" (Pl. Ex. 74, P.A. 139).

16. On July 20, 1961, Mr. Schiavina submitted still another written report (a so-called "dealer review") to the Johnson management, commenting that petitioner's "Service" was "Poorly organized—squalid—

can stand improvements" (Pl. Ex. 22, P.A. 143-44). Mr. Schiavina also concurred with Mr. Clayton's recommendation that petitioner be given no service station listing. The report concluded as follows: "Recommend 1962 Dealer Agreement be held pending further investigation in this area. I [am] very disappointed with this dealer's service shop set-up. He is not keeping a stock and record book".

17. During the period of Mr. Schiavina's dealings with petitioner the Johnson management and Schiavina received complaints concerning petitioner's servicing of motors of customers who had bought Johnson motors (R.A. 65-66, 73).

18. In the same period respondent had continuous credit difficulties with petitioner (R.A. 18). As Mr. Canzona admitted, petitioner was "slow pay" with respect to its various suppliers, including respondent (P.A. 35; R.A. 18; Def. Ex. 16, R.A. 98-125; Def. Ex. 20, R.A. 130-51; Def. Ex. 32, R.A. 158-77).

19. The courts below treated it as established that in the summer of 1961 Schiavina learned that petitioner had taken on a franchise to sell Mercury motors (in addition to Johnson and Scott) and that he protested to petitioner about this additional franchise (see Pet. A-5). There is no evidence that, if these events occurred, Schiavina so advised the Johnson management.

20. In the summer of 1961, being dissatisfied with petitioner as a Johnson dealer, Schiavina investigated and found a potential new dealer six miles away. The new prospect was Nat Gates & Sons, an established marine dealer whom Schiavina described to the Johnson management as "one of the best dealers in this Annapolis area" (Def. Ex. 47, P.A. 148). Under an

earlier arrangement with respondent's Evinrude Division, Gates had achieved the extraordinary sales rate of 500 Evinrude motors per year (R.A. 79-80).

21. In reporting to the Johnson management with respect to Gates' potentiality as a Johnson dealer, Schiavina advised his superiors that Gates was then handling Mercury motors and intended to continue to do so (Def. Ex. 46, P.A. 147).

22. Shortly thereafter Schiavina recommended to the Johnson management that petitioner's Johnson franchise not be renewed and that the franchise be awarded to Gates (Def. Ex. 47, P.A. 148). The courts below treated it as established that Schiavina recommended non-renewal of petitioner's franchise because petitioner had taken on the third line of motors (Mercury) (Pet. B-4, A-5).

23. Respondent decided to allow petitioner's Johnson franchise to lapse and to award the franchise to Gates. The decision was made not by Mr. Schiavina, but by his superiors in the Waukegan office [7] which had been receiving complaints about petitioner from its field personnel and customers and had been experiencing credit difficulties with petitioner (R.A. 65-66, 73; P.A. 35; R.A. 18, 64).

24. Following the award of the Johnson franchise to Gates, the latter continued to sell both Johnson and Mercury motors with the full knowledge of the Johnson management (see Def. Ex. 46, P.A. 147). Ultimately Gates ceased handling the Mercury motor when Mer-

[7] The decision not to renew the petitioner's Johnson franchise was actually made by a Mr. Kalbfus, Johnson's Director of Sales, and three levels above Mr. Schiavina in the Johnson hierarchy (Pl. Ex. 46, P.A. 119).

cury terminated his franchise against his wishes (see Def. Ex. 49, P.A. 150).[8]

25. Insofar as Schiavina's personal conduct is concerned, the net result was that he had recommended the non-renewal of a dealer's Johnson franchise because (according to the courts below) the dealer was also handling Mercury, and he had simultaneously recommended that the same Johnson franchise be given to another dealer who was handling Mercury. In evaluating this conduct it should be borne in mind that in the early months of 1961, before petitioner had taken on the Mercury motor, Schiavina had become thoroughly dissatisfied with petitioner on the basis of its "squalid" condition, customer complaints, and financial irresponsibility; that before taking on Mercury petitioner had already been spreading its selling energies and financial resources over a vast array of products (Def. Ex. 19, R.A. 129; R.A. 58); and that the addition of still another line (Mercury) might well have tended to reduce the effectiveness of petitioner as a sound Johnson dealer—while Gates had been a fine dealer who had demonstrated an ability to sell 500 outboard motors a year.

26. There is no specific evidence in the record as to the number or proportion of respondent's dealers that in fact dealt in competitive motors, except with respect to respondent's Johnson dealers in its Territory 23,

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[8] The implication in the Petition (p. 7) and in the Government's Memorandum (pp. 2-3) that respondent somehow persuaded Gates to get rid of the Mercury motor is totally without foundation and is in fact refuted by affirmative proof (Def. Ex. 49, P.A. 150). When petitioner persisted in implying, during the trial, that respondent had forced Gates to relinquish the Mercury franchise, the District Court expressly invited petitioner to use compulsory process to elicit Gates' testimony as to why he had ceased to be a Mercury dealer, but petitioner refused (Tr. 837-39; see Pet. B-5).

the territory in which Messrs. Wright and Schiavina successively served as district manager. There, of the approximately 100 Johnson dealers in the territory (R.A. 63), ten dealt in competitive motors (R.A. 59; P.A. 91-93), a fact which was known to respondent's management and to which that management made no objection (R.A. 57; and see, *e.g.;* Pl. Exs. 62-64, R.A. 200-03; Def. Exs. 4-7, R.A. 88-92; Def. Ex. 46, P.A. 147; Def. Ex. 50, P.A. 151).[9]

27. The petitioner strongly suggests—and the Government's memorandum states flatly—that all of the Johnson dealers who dealt in competitive motors "were in rural areas where substitute dealers were hard to find" (Gov. Mem. 3; see Pet. 9). This is not a responsible reading of the record. Of the ten dealers who handled competitive motors in Territory 23 in the relevant period, only three were shown to be located in rural areas (P.A. 80-81, 96, 97). As to the other seven, either the record does not show the character of the area (*i.e.,* rural vs. urban), or it shows that the particular dealer was located in an urban area (P.A. 96, 97).

28. Mr. Wright testified that during his several years in respondent's employ (P.A. 57) there were eight occasions when he approached a dealer who was handling competing motors and suggested that the dealer cease handling the competing motor and concentrate entirely on the Johnson motor (P.A. 65-75). There is

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[9] During Mr. Wright's tenure in Territory 23, six of his dealers were handling competing motors (P.A. 66, 71, 77, 78, 91, 92, 94-95; R.A. 59). When Mr. Schiavina succeeded Mr. Wright in Territory 23, the Johnson Division added four more such dealers on Schiavina's recommendation (P.A. 91-92, 147), thus bringing the total number of dealers who were handling competing motors in the territory to ten.

not the slightest suggestion in the record that on any of these occasions Mr. Wright "threatened" that, if the dealer continued to handle competing motors, the Johnson Division would refuse to deal with him.[10] Moreover, Mr. Wright's suggestions were not notably successful. In three of the eight cases the dealer accepted the suggestion and gave up handling the competing motor (P.A. 65-67), but in the other five cases the dealer flatly refused to give up his competing line of engines and continued to handle them as before (P.A. 65-74). There is no suggestion in the record that, when such refusals occurred, any retaliation was forthcoming from Mr. Wright or anyone else.[11]

29. During his testimony with respect to his eight efforts to persuade a dealer to stop handling competing motors, Mr. Wright (and, indeed, counsel for petitioner) made very clear that at the time Wright made these efforts respondent's policy prohibited discrimination against dealers handling competing motors, that his suggestions that particular dealers give up handling competing motors constituted deviations from his instructions from his superiors, and that none of his efforts to persuade dealers to handle respondent's

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[10] Petitioner's offer of proof included proffered testimony that in 1959 a former employee of the Johnson Division approached a Philadelphia dealer and "demanded that they cease handling a Neptune outboard motor", a "low priced, small horsepower specialty product" (P.A. 109-10). The proffered testimony did not include any testimony as to a threat of cancellation or as to the circumstances surrounding the "demand".

[11] Compare petitioner's erroneous statement that Mr. Wright testified that "he had personally recommended cancellation of a number of dealer franchises for the sole reason that the dealer refused to give up a competing line of outboard engines, PA63 [and 64-65]" (Pet. 7). The statement is untrue; there is no evidence to that effect either at the cited pages or elsewhere.

motors exclusively was known to any of his superiors (P.A. 65-72).

3. Petitioner's Theories of Violation and the Findings of the Courts Below

In the District Court and the Court of Appeals below petitioner rested its entire case on the Sherman Act. Not only did petitioner not assert any claim under Section 3 of the Clayton Act, but when the Court of Appeals referred to the latter statute in its opinion, petitioner objected, characterizing the Court's discussion of Section 3 of the Clayton Act as being "irrelevant".[12] In this Court petitioner makes brief reference to Section 3 of the Clayton Act (Pet. 20), but in the courts below it affirmatively eschewed any such theory of liability.

With respect to its theory under Section 1 of the Sherman Act, petitioner's position has undergone a series of changes. In its Complaint its Section 1 position was that respondent and certain dealers in the Baltimore area had conspired together to put petitioner out of business as a Johnson dealer (P.A. 3), but proof was lacking and the charge was dropped.[13] Then in its final argument to the District Court, after it had completed its evidentiary submission, petitioner began to talk in terms of a "combination" between respondent and its dealers generally with respect to the handling of competing motors, citing *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).[14] Apparently recog-

[12] Petition for Rehearing to the Court of Appeals (p. 12).

[13] This Section 1 theory was never mentioned in the Court of Appeals and has necessarily been abandoned.

[14] See "Plaintiff's Memorandum" filed in the District Court on April 4, 1966 (p. 23), and Petitioner's Brief in the Court of Appeals (pp. 21-31).

nizing, however, that it had not proved or offered to prove such a "combination", petitioner simultaneously insisted before the District Court that "the thrust" of its case was not a violation of Section 1 but was "a Section 2 offense" (Tr. 766; see also Tr. 761, 768, 835). Finally, in the Court of Appeals petitioner decided to reassert its *Parke, Davis* theory as well as its charges under Section 2.

Despite the somewhat confusing fluidity of petitioner's position, both of the courts below nevertheless accepted as true all of the factual propositions presented by the plaintiff, both in the form of evidence and in the form of the proffer of proof.[15] Having accepted these factual propositions as true, the question then was whether they established any of the ultimate facts ("combination or conspiracy", "intent to achieve a monopoly", etc.) which would give rise to Sherman Act liability.[16] The District Court found as a fact that none of the requisite elements of liability were present, and the Court of Appeals explicitly concurred in those

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[15] The Government is simply wrong in its unspecific statement that the Court of Appeals below "refus[ed] to treat as true . . . the facts set out in petitioner's offer of proof" (Gov. Mem. 6 n. 12). No evidence proffered by petitioner was treated as untrue by either of the courts below.

[16] The Government is wrong in suggesting that, once the District Court had taken as true "all of the relevant facts in the offer of proof", the courts below were then required to draw "all inferences favorable to petitioner . . . from such facts" (Gov. Mem. 2). Fed. R. Civ. P. 41(b) makes clear that in a case "tried by the court without a jury", if the defendant moves for dismissal at the close of the plaintiff's evidence on the ground that the plaintiff has failed to make out a case, "[t]he court as trier of the facts may determine them", weighing the evidence and drawing inferences as at the conclusion of the case. See Notes of Advisory Committee, Rule 41(b), 28 U.S.C.A., p. 205 (1958 ed.). This is exactly what was done by the District Court below.

findings. The ultimate facts as thus concurrently found by both courts are, in summary, as follows:

(a) There was no "combination" or "conspiracy" among the respondent and its dealers (or anyone else) so as to give rise to liability under Section 1 of the Sherman Act, either under a *Parke, Davis* theory or otherwise (Pet. B-1-2, A-6). As observed by the Court of Appeals, there simply was no "joint or concurring action" among respondent and its dealers so as to bring the case within the *Parke, Davis* doctrine (Pet. A-8).

(b) Similarly, both the District Court and the Court of Appeals found that there was no conspiracy to monopolize under Section 2 (Pet. B-2, A-6).

(c) Both courts found that there was no evidence to show that respondent enjoyed monopoly power (either the ability to fix prices or to exclude competition) or that respondent had done any act tending to strengthen its alleged monopoly position (Pet. B-3, B-4, A-6).

(d) With respect to petitioner's theory that there had been an "attempt to monopolize" in violation of Section 2, both courts found that there was no specific intent to monopolize and that if there had been such intent, there was no dangerous possibility that the attempt would be successful (Pet. B-8-11, A-6).

There is one additional factual issue which was considered by the Court of Appeals but not by the District Court—namely, whether respondent had entered into arrangements with its dealers with respect to their handling of competing motors in such a way as to raise a question under Section 3 of the Clayton Act. The

District Court did not consider the issue because petitioner never raised any Section 3 question at the trial level. The Court of Appeals considered the issue *sua sponte* but concluded that, since there was no evidence of any "joint or concurring action" between respondent and its dealers with respect to the handling of competing motors, there was no factual basis for a finding of a violation of Section 3 (Pet. A-8).

It should be emphasized that in this Court petitioner does not quarrel with any of the substantive principles of antitrust law applied by the courts below. As will fully appear from the following analysis, petitioner's only disagreement with the courts below is that it disagrees with their concurrent findings as to the facts.

REASONS FOR THE DENIAL OF THE WRIT

I. THE ANTITRUST QUESTION FOR WHICH PETITIONER SEEKS REVIEW IS NOT PRESENTED ON THIS RECORD

A quick reading of the first "Question Presented" by petitioner might leave the impression that this case involved significant new questions of antitrust law. The fact of the matter, however, is that although that "question presented" may be interesting in terms of abstract theory, it is not raised by the record in this case. The "question" contains a major premise and five subsidiary provisions, but, as demonstrated immediately below, nothing in the record supports either the premise or any of the subsidiary points. (The Government's view of the case will be discussed separately in Part II, pp. 28-34, *infra*.)

Petitioner's premise is that the case involves a manufacturer who has made it a practice "to cancel the franchises of dealers who refuse to stop selling the

products of competing manufacturers" (Pet. 2). At other points the alleged "practice" (Pet. 19) is described as an "exclusive dealing policy" (*e.g.*, Pet. 10, 12, 18) embodied in "oral understandings with the majority of its 8,700 dealers" (Pet. 20) with respect to their handling of competing products. The theme, in other words, is a pattern of conduct permeating respondent's relations with its dealers generally, all for the purpose of "systematically preventing" such dealers from handling competing products (Pet. 10-11).

Given the state of the record, these are extraordinary claims. Witnesses called by the petitioner itself established that respondent's policy, as practiced by its management and directed to its employees, was *not* to discriminate against dealers who handled competing products (Def. Ex. 9, P.A. 142; P.A. 77-78; R.A. 56-57), and it was also established that, when one of respondent's former salesmen tried to persuade a few dealers to give up competing products (unsuccessfully in five out of eight cases),[17] he was knowingly violating his orders and did not tell his superiors of the violation (P.A. 69-72; R.A. 61-62). There was not a shred of evidence that respondent had "oral understandings with the majority of its 8,700 dealers" on the subject of competitive products or on any other subject.

Nor was there any practice on the part of respondent "to cancel the franchises of dealers" for any anticompetitive reason. In this connection it should be noted that petitioner had available the names and addresses of a veritable army of persons who for one reason or another had dropped out of respondent's dealership

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[17] See p. 17, *supra*.

organization before the trial,[18] and it may be assumed that substantial numbers of these persons were available to give evidence as to the reasons why they ceased to be respondent's dealers. Yet petitioner proved and offered to prove, at best, only a *single cancellation* of a single dealer—namely, the petitioner itself. On the record this is simply not a case involving any general practice on the part of a manufacturer.[19]

Turning to subsidiary proposition (a), it is alleged that one of the effects of this non-existent general practice was to "preserve the manufacturer's approximately 60% share of its national market." Assuming the validity of the percentage figure (see P.A. 98-101), there is no evidence that anything like the alleged practice had any effect on the manufacturer's market share.[20]

Subsidiary proposition (b) is that one effect of the alleged practice was to "exclude competing manufacturers from approximately 8,700 (or some 58% to 72%) of the estimated 12,000 and 15,000 retail outlets in the country". The allegation is purest fiction. To begin with, petitioner never proved nor offered to prove

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[18] In answer to an interrogatory of petitioner, respondent furnished the names and addresses of approximately 4,000 persons who ceased to be dealers in respondent's products in the period 1959-1965.

[19] Both of the courts below concurrently found as a fact that this record shows only "a single instance" of a refusal to deal on the part of respondent (Pet. B-11, A-6).

[20] See also the petition's surprising assertion that "there is no serious dispute here that this exclusive dealing policy has the straight-forward effect of enhancing the sales volume (and market share) of the defendant and shrinking that of its competitors" (Pet. 12-13). There is no evidence that such an "exclusive dealing policy" exists or that it has had any "effect" on sales or market share, "straight-forward" or otherwise.

how many of respondent's "approximately 8,700" dealers handle competing products and how many do not.[21] It was established that in a single geographical area encompassing about 100 dealers, ten handled competing products without objection from the respondent, but there is no data whatever as to the remaining 8,600. Indeed, neither during pretrial discovery nor at any other time did petitioner ever *ask* for such information.

In view of the fact that a majority of all marine dealers handle only a single line of engines (Def. Ex. 9, P.A. 142), there can be no doubt that the majority of the respondent's dealers do the same, but there is nothing to show that this is because competing engines have been "excluded" by some action of the respondent.[22] On the contrary, there is evidence in the record that the personal preference of most dealers is to handle only one line of engines (Def. Ex. 9, P.A. 142) (presumably to reduce the expenses of inventorying motors and spare parts, to reduce training costs for service employees, etc.) and that respondent's management has no objection to a dealer's handling a competing engine (P.A. 76-78; R.A. 59-62, 64).

Nor is there anything to show that some conduct on the part of respondent has had the effect (as further

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[21] For this reason there is no evidence to support petitioner's statement that respondent's "8,700 marine dealers . . . are operating under similar exclusive dealing arrangements" (Pet. 21).

[22] The petitioner also says that "Mercury and Scott" have been "excluded from any significant share of the local market", referring to "the Maryland area" (Pet. 8), but the statement is misleading in several respects: (1) the cited testimony (P.A. 116-17) says nothing about the "share of market", in terms of sales, of either Scott or Mercury; (2) the testimony relates only to one small part of the State of Maryland; and (3) there is no testimony as to Mercury and Scott having been "excluded" by respondent, even with respect to that small part of Maryland.

suggested in Question 1(b)) of "stifling the growth of existing competitors and creating severe cost and price barriers against the entry of new manufacturers." Although the necessary market-share and financial information might well have been available through compulsory process, the petitioner never even sought to obtain or offer any evidence with respect to the market shares or the "growth" of existing competitors or with respect to costs and prices in the industry. The concept of "barriers" to new entry apparently occurred to petitioner some time after its loss in the court below; it was certainly never mentioned at any time before the filing of the present petition. The suggestion is without any evidentiary basis, and if its truth or falsity were now at issue, it would soon become apparent that it is factually wrong.[23]

Next it is suggested, in Question 1(c), that respondent, through its alleged cancellation practice, has created a "noncompetitive market structure at the dealer level in virtually every local market in the United States." These are resounding words, but there was no evidence as to the market structure in *any* local market in *any* part of the country.[24] It is also said

[23] Although the fact is not in the record, respondent will take the liberty (in view of the liberties taken by the petitioner) of referring the Court to current issues of popular boating magazines in which a new entrant, Chrysler Corporation, is advertising its new line of outboard motors. See, *e.g.*, Yachting Magazine, October, 1967, at 46.

[24] The petitioner also asserts that in the relevant market the factor of "product differentiation" so operates that respondent may "charge a substantially higher price than can be gotten by others for products of comparable quality" (Pet. 10). There is not a shred of evidence of such "product differentiation", and there is equally little evidence that respondent obtains a higher price for its products than do others.

in effect (in Question 1(d)) that respondent has brought about the "ruin" of "the larger dealers who attempt to sell a competing product", and yet petitioner never offered to show that respondent had ever "ruined" anyone. All the evidence shows is that a single outboard motor dealer (the petitioner) lost its Johnson motor franchise and that that dealer's business subsequently declined—and there was evidence that the decline was the result of a host of factors unrelated to the respondent.[25]

Finally, it is suggested in Question 1(e) that the respondent has somehow managed to "impose on the consuming public a supercompetitive price for the

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[25] Contrary to petitioner's assertion (without record citation) that "plaintiff's business promptly collapsed with the withdrawal of the 'Johnson' franchise" (Pet. 6), petitioner had greater business success the year after the non-renewal of its franchise than it did while it was handling the Johnson motor (P.A. 40; R.A. 41). Thereafter its business gradually declined but for a number of unrelated reasons, including the following: (1) on the day petitioner's Johnson franchise expired, another supplier (the manufacturer of the well-known "Boston Whaler" boat) cancelled petitioner's boat franchise (Def. Ex. 24, R.A. 152); (2) in 1962 petitioner lost its Scott motor franchise (R.A. 41); (3) in 1963 it lost its franchise for its largest line of boats (Def. Ex. 40, R.A. 184); and (4) in 1965 it lost its franchise for Mercury motors (R.A. 49). Significantly, from 1961 until 1966, when repeatedly asked by stockholders and creditors why its business had declined, Mr. Canzona repeatedly explained that in mid-1961 the marine retail industry generally had gone into an economic recession, that marine dealers generally were suffering lost sales and lost profits, and that petitioner was suffering with the rest (Def. Exs. 29-31, R.A. 153-57). It was not until the time of trial that petitioner decided that the loss of the Johnson franchise was the sole cause of its troubles. In view of these circumstances little weight should be given to the Government's flat statement (p. 3) that "as a result of the loss of respondent's franchise, petitioner's business failed."

product, one that exceeds the level that would be expected to prevail in an effectively competitive market by perhaps as much as 15%".[26] Again, the phrases are resounding but without the slightest evidentiary basis. The petitioner never proved or offered to prove the prices of any of the various outboard motors on the market, let alone the proposition that the respondent charged "supercompetitive" prices.[27]

In sum, petitioner's first "Question Presented" leaves one strong impression—namely, that after the court below had finally disposed of its case, petitioner did some hasty reading in the economic field and constructed a group of hypothetical economic propositions for which there is no evidentiary basis in the record. Of course, these economic theories had been advanced

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[26] The petitioner also hypothesizes that respondent enjoys monopoly profits as a result of charging monopoly prices for its outboard motors, and tries to support this thesis by certain computations as to the profits earned by respondent's multi-product business (Pet. 15). In fact there is nothing in the record as to the profits earned by respondent on its outboard motor business. Moreover, although a demonstration that petitioner's computations are entirely misleading would require an unduly lengthy discussion here, it may be noted that during the time petitioner was dealing with respondent the latter's after-tax earnings averaged 9.9% as a percent of stockholders' equity and 5.45% as a percent of sales and that in subsequent years respondent's average profit rates declined (OMC Annual Reports, Pl. Ex. 71, Tr. 628). Even under petitioner's own economic theory (Pet. 15 n. 17) such profit rates "could not be identified as supernormal".

[27] On a related theme petitioner repeatedly asserts that respondent charges 15% more for its Johnson and Evinrude engines than it does for its Gale engine (see, *e.g.*, Pet. 11, 12). There is no evidence to that effect. However, there is evidence that the Gale motor was sold under a private brand ("Sea King") to Montgomery Ward (P.A. 52) which would of course explain a price differential if one existed.

elsewhere some years before the trial of this case in 1966,[28] and if petitioner had wished to raise such issues, it had an ample opportunity to do so. The simple facts are that petitioner did not even attempt to litigate these issues, that they are not presented by this record, and that this case is not a vehicle for their review by this Court.

II. THE QUESTION FOR WHICH THE GOVERNMENT SEEKS REVIEW IS NOT PRESENTED ON THIS RECORD

The Government's view of this case, although based upon some of the same erroneous factual impressions set forth in the petition for certiorari, differs from petitioner's view as to the applicable statutes. Petitioner repeatedly told the courts below that "the thrust" of its case was an offense under the monopoly provisions of Section 2 of the Sherman Act,[29] but the Government apparently sees no substantial Section 2 question in this case.[30] The Government's position here is that respondent engaged in a violation of Section 1 of the Sherman Act, although not the type of violation which petitioner attempted to prove in the District Court,[31] and that respondent also violated Section 3 of the Clayton Act, although petitioner in the courts

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[28] See petitioner's reliance upon Bain, *Barriers to New Competition* (1956); Bain, *Industrial Organization* (1959); Kaysen and Turner, *Antitrust Policy* (1959) (Pet. 11-15, etc.). See also Commissioner Elman's opinion in Procter & Gamble Co., [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,673, at 21,560 (FTC 1963).

[29] See pp. 18-19, *supra*.

[30] Literally the Government "express[es] no view" as to the applicability of Section 2 (Gov. Mem. 6 n. 12), but the implication is reasonably clear that the Government has found no Section 2 problem which deserves consideration by this Court.

[31] See p. 18, *supra*.

below treated the latter statute as "irrelevant" (see p. 18, *supra*). Because of these differences the Government's thesis deserves separate treatment.

The Government's memorandum starts from the factual premise that as a matter of practice respondent has made "demands" on its dealers generally to handle respondent's motors exclusively. It is said that "dealers have acquiesced in respondent's exclusivity demands" (Gov. Mem. 3), so that there has been "tacit acquiescence of distributors in exclusive dealing arrangements" (*id.* at 4), thus creating "an anticompetitive program embodied in tacit agreements with acquiescent dealers" (*id.* at 10).

The motivating force, it is said, which has prompted respondent's dealers "to fall in line" with this "unlawful program" is "*threats* of refusals to deal" (*id.* at 4, 12): "respondent has threatened dealers with the termination of their franchises for failure to deal exclusively with respondent" (*id.* at 7). In addition we are told that occasionally, when an "intractable dealer" has refused to knuckle under to the "threats", he has been "cut off as an example to others" (*id.* at 4). Indeed, it is said that respondent's refusal to renew petitioner's franchise was a warning to other dealers: it "necessarily indicated to other dealers that respondent's threats of cancellation for handling competing products were to be taken seriously, and thus tended to insure continued acquiescence in respondent's exclusive dealing arrangements" (*id.* at 9). Such were respondent's methods, the Government says, and *"the question presented here"*, therefore, is whether a cancelled dealer has a "right to relief against . . . a supplier . . . who uses refusal to deal as a means to secure

compliance with an anticompetitive program embodied in tacit agreements with acquiescent dealers" (*id.* at 10).

Such is the Government's theory; now let us get back to the record. It simply does not support the theory. In the context of an organization of 8,700 dealers, the relevant *evidence* is as follows: that throughout respondent's history, in the course of the thousands of conversations between respondent's salesmen and its 8,700 dealers, there were *two* occasions on which a salesman "demanded" that a dealer deal exclusively;[32] that such demands violated the salesman's instructions;[33] that neither of the two dealers acquiesced in the unauthorized demand;[34] that on eight other occasions a single salesman, Mr. Wright, who has long since left respondent's employ, deviated from company policy by suggesting that a dealer discontinue a competing line of engines; that on three of the eight occasions the dealer followed this unauthorized suggestion; and that on five of the eight occasions the dealer refused to deal exclusively in Johnson engines and suffered no adverse consequences.[35] Although the Gov-

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[32] In view of the findings of the courts below, Mr. Schiavina's conversations with petitioner with respect to Mercury engines should presumably be regarded for present purposes as a "demand" for exclusive dealing (although Mr. Schiavina never mentioned the Scott line of engines still being handled by petitioner). The only other such "demand" shown by the record was that made by a Mr. Jonas, a former sales representative of respondent (see p. 17 n. 10, *supra*).

[33] It was established by Mr. Wright, a former employee of respondent, that such demands violate company policy (P.A. 65-72).

[34] Petitioner refused to give up the Mercury engine, and the Philadelphia dealer to whom Mr. Jonas made his "demand" continued to handle competing engines (P.A. 110).

[35] See p. 17, *supra*.

ernment talks in terms of multiple "threats" designed to keep respondent's dealers generally "in line" with an unlawful "program", the *only threat* of cancellation shown in this record is the alleged threat against the petitioner, and if any "intractable dealer" has been "cut off", the *only* one is petitioner.[36] Moreover, in response to the Government's hypothesis that "cut-offs" have been used as warning "examples" to others, the answer is that the only "cut-off" in the case is the cut-off of petitioner and that *both* courts below explicitly found that it was *not* done or used as a warning to others.[37]

So much for the "demands", "threats", and "examples". What then does the record show as to the Government's hypothetical "tacit agreements" between respondent and its dealers—the bricks and mortar of the alleged "anticompetitive program"? With 8,700 dealers involved, and with 4,000 former dealers available to give evidence,[38] the record shows, at best, the possibility that *three* dealers entered into such tacit agreements—and that all three arrangements were

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[36] See p. 23 n. 19, *supra*.

[37] The District Court's finding was as follows:

> "The argument is made to me that this [*i.e.*, petitioner's situation] would be a good example for Outboard to cite to its other dealers . . . to exert all sorts of pressures on them . . . to carry on exclusive dealing . . . but I think the answer to that is that there is not the slightest proof that this is what . . . [was] done." (Pet. B-9)

The Court of Appeals made the same finding:

> "[T]here was no evidence that the disenfranchisement of Amplex was held out threateningly as a deterrent to other dealers . . . ." (Pet. A-6)

[38] See pp. 22-23 and n. 18, *supra*.

made by a salesman who has admitted that he was acting in violation of his instructions and without his superior's knowledge. Thus the Government's "unlawful program" consists, at best, of *unauthorized* "tacit agreements" involving less than four one-hundredths of one percent of respondent's dealer organization. Again, this is simply not a case involving a general policy or program or course of conduct or concerted action between a manufacturer and its dealers.[39] *Cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960)

There is one additional factual point in the Government's Memorandum that deserves attention—namely, the suggestion that the record in this case shows that respondent's conduct "produced a sufficiently serious foreclosure of outlets to respondent's competitors to establish the requisite anticompetitive effect under either Section 1 of the Sherman Act or Section 3 of the Clayton Act" (Gov. Mem. 7). Apparently recognizing that an "exclusive dealing policy" (if one existed) could not be held to violate either statute in the absence of some showing of anticompetitive effect, the Government treats this record as demonstrating that for the purposes of the Sherman Act respondent's conduct has unreasonably restricted the opportunities of its com-

[39] The Government's approach to the factual issues in this case, including the key factual issue of whether respondent engaged in an anticompetitive program, is strangely at odds with the principles governing appellate review of lower courts' findings of fact. The Government urges that the evidence below "would justify" findings contrary to those made by the courts below (Gov. Mem. 7), whereas the only proper inquiry (if the facts are to be reviewed at all) is whether the courts below plainly erred in their findings.

petitors in the market place [40] and that for the purposes of the Clayton Act respondent's conduct might substantially lessen competition or tend to create a monopoly.[41]

These are remarkable contentions. According to petitioner (Pet. 8, 11), there are somewhere between 12,000 and 15,000 marine dealers in the United States, and the total evidence of "foreclosure" is that in 1958 a Johnson salesman persuaded a dealer to stop handling the so-called "West Bend" motor, that at some unknown time another dealer was persuaded to give up the so-called "Champion" motor, and that on a third occasion a dealer was persuaded to "phase out" the Scott motor—all of such persuasive efforts being contrary to the salesman's instructions (P.A. 63-67).[42] With 12,000 to 15,000 dealers in the market and *no evidence* as to the position which any of the three specified motors enjoy as among the 12,000-15,000

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[40] See United States v. Columbia Steel Co., 334 U.S. 495, 524 (1948).

[41] Compare, however, the Government's astonishing statement that the question of anticompetitive effect "is not before this Court" (Gov. Mem. 7 n. 13). The Government is asking, implicitly but clearly, for a reversal of the decision below because of alleged violations of both of the above-mentioned statutes, and obviously a reversal on such grounds would be appropriate only if the record contains a *prima facie* showing of the necessary anticompetitive effect. Even the petitioner here concedes that it had the burden of proof on this issue and that it cannot prevail here unless it successfully carried that burden in the District Court below (see Pet. 10 n. 10).

[42] The Government quite properly does not suggest that respondent's non-renewal of petitioner's Johnson franchise had an anticompetitive effect on the Mercury motor. The Johnson franchise was simply shifted from one Mercury dealer to another, leaving Mercury's position unaffected.

dealers, it is simply unbelievable that the evidence of these three unauthorized events constitutes a showing of the anticompetitive effect required by Section 1 of the Sherman Act and Section 3 of the Clayton Act.

Finally, it may be appropriate to observe that there is no justification for the Government's suggestion that the Court of Appeals declared and applied in this case a legal principle of broad application that will adversely affect the proper enforcement of the antitrust laws. The Government apparently believes that in this and other cases in the Fourth Circuit there has been laid down an absolute rule that, even where a manufacturer has established an anticompetitive exclusive dealing program among its dealers generally, a dealer who is cancelled because he will not participate in the program *never* has a right to treble-damage recovery. It is submitted, however, that the decision below does not rest on any such broad basis. Both in the opinion below (Pet. A-8), and in *Osborn* v. *Sinclair Refining Co.*, 324 F. 2d 566 (4th Cir. 1963), cited in the opinion below, the Court of Appeals recognized that, if such a joint program between a manufacturer and its dealers exists, a cancelled dealer may in certain circumstances have a cause of action for damages. The Court's affirmance of the District Court here was based on the lack of evidence of "joint or concurring action" in the form of exclusive dealing arrangements between respondent and its dealers. It was, said the Court, the "absence" of any "such additional circumstance" that "destroys the actionability" that might otherwise exist under *Osborn* (Pet. A-8). In short, the Government's concern about the state of the law in the Fourth Circuit would seem to be unwarranted: when an antitrust violation occurs, those who may be injured will be protected in the Fourth Circuit.

III. THERE IS NO NOTEWORTHY QUESTION OF PROCEDURE HERE INVOLVED

Petitioner's second "question presented", relating to the procedure used by the District Court, is also based upon misstatements of fact and law. The wording of the petition is clearly intended to suggest that petitioner was "required" against its will to substitute a proffer of proof for direct evidence (see Pet. 3, 6, 23). In fact the trial court made clear that the petitioner was free to proceed with its entire case if it wanted to do so; moreover, petitioner wholeheartedly accepted the Court's suggestion for a possible shortening of the trial (see p. 6, *supra*).[43] Thereafter both courts below accepted as true all of the basic facts to which reference was made either in petitioner's direct proof or in its proffer.[44] Although the District Court was not obliged to draw all inferences from those basic facts in a manner favorable to petitioner,[45] it leaned over backwards to do so and still could not find an antitrust violation. The concurring findings of both courts below that there was no such violation should be accepted by this Court.

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[43] In view of the fact that the case went to trial and that petitioner was offered an opportunity to put in all of the evidence that it wanted, petitioner's reliance upon Poller v. Columbia Broadcasting Company, 368 U.S. 464 (1962), and Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), is misplaced. Unlike the situations in *Poller* and *Continental Ore*, the procedures used in this case did not raise any such questions as deprivation of the right to a jury trial or the resolution of factual issues on the basis of affidavit testimony which has not been tested by cross-examination.

[44] See p. 19 n. 15, *supra*.

[45] See p. 19 n. 16, *supra*.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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